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August 1, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Mr. William Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Mr. Caton:

Please find enclosed for filing the original and four copies of the RBOC/GTE Payphone Coalition's Opposition to, and Comments on, Telco and Excel's Applications for Review of the Bureau's Orders of April 4, 1997 and April 15, 1997.

Attached in a separate envelope is an extra copy to be date-stamped and returned.

Sincerely,

Michael Kellogg /KJC

Michael K. Kellogg

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the
Telecommunications Act of 1996

ORIGINAL

THE RBOC/G
OPPOSITION TO, [illegible]
EXCEL'S APPLICATIONS FOR REVIEW OF THE BUREAU'S
ORDERS OF APRIL 4, 1997 AND APRIL 15, 1997

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Executive Summary

The Common Carrier Bureau has issued two wholly reasonable and very limited waivers of the Commission's payphone orders in order to allow LECs an opportunity to comply with newly-announced clarifications of those orders. The carbon-copy pairs of challenges to the two waivers raised by Excel and Telco are both procedurally improper and substantively baseless.

As an initial matter, Excel and Telco failed to place their objections before the Bureau, and they offer no excuse for their failure to do so. Under the Commission's rules, no party may file an application for review unless it participated before the Bureau or it explains why it was not possible for it to do so. Because Excel and Telco have done neither, their applications for review must be dismissed. Point I, infra.

On the merits, the applications for review fare no better. With respect to the April 4 Clarification Order, neither Telco nor Excel anywhere addresses the basis for the waiver -- the fact that the LECs had relied in good faith on a reasonable interpretation of the payphone orders. Indeed, the LECs' reading of the payphone orders was not only reasonable, but well grounded in both the language and purpose of those orders. Given this, the Bureau's decision to allow LECs a limited waiver of 34 days during which to comply with the additional tariffing requirements announced in the April 4 Clarification Order was not in error. Indeed, any other course would have left that order open to legal challenge. See Points II-A, II-B, infra.

Rather than address this unusual circumstance, Telco and Excel argue that the limited 30-day waiver may have resulted in double-recovery for LECs or anticompetitive conduct. Their claims are preposterous. No double-recovery occurred because all payphone subsidies were removed effective April 15, 1997. Nor has anti-competitive conduct resulted from this limited 34-day extension.

Indeed, Telco and Excel nowhere even explain the nature of the conduct they purport to fear. See Point II-C, infra.

With respect to the April 15 Waiver Order, Excel and Telco do address the basis for the Waiver, but argue that no LEC could have misunderstood the Commission's orders. But the LECs' reading of the payphone orders was, once again, not merely reasonable but compelling. Consequently, the Bureau was more than reasonable in allowing them extra time to comply with this requirement. This is especially true given that the waiver put competing PSPs in a position better than the one they otherwise would have occupied. See Point III, infra.

In the end, Telco and Excel utterly fail to come to terms with the Commission's settled standards for granting waivers. Nor could they, as each of the Commission's criteria were clearly met here. There were "special circumstances," as the LECs had relied in good faith on a reasonable interpretation of the Commission's orders. A waiver was necessary to avoid "hardship" and "inequity." Absent a waiver, the LECs would have been denied millions of dollars in per-call compensation, even though they acted wholly in good faith and in accordance with the plain language of the Commission's orders. In contrast to the hardship denying the waiver would have imposed on LECs, granting the waivers harmed no one: Appropriate safeguards remained in place, and any price changes would be made effective back to April 15, 1997, if to the benefit of competing PSPs. Finally, granting the waiver was consistent with, and promoted, the policies underlying the Commission's payphone orders -- ensuring that subsidies were eliminated "in favor of" per-call compensation, and that PSPs are "fairly" compensated for "each and every call" completed using their payphones.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

Implementation of the Pay Telephone	)	
Reclassification and Compensation	)	CC Docket No. 96-128
Provisions of the	)	
Telecommunications Act of 1996	)	

THE RBOC/GTE PAYPHONE COALITION'S OPPOSITION TO, AND COMMENTS ON, TELCO AND EXCEL'S APPLICATIONS FOR REVIEW OF THE BUREAU'S ORDERS OF APRIL 4, 1997 AND APRIL 15, 1997

Seeking to avoid their obligation to compensate LEC PSPs for subscriber 800 and access code calls originated on LEC payphones, Telco Communications Group ("Telco") and Excel Telecommunications, Inc. ("Excel") have filed carbon-copy applications for review of the Bureau's April 4, 1997 Order in this proceeding, CC Docket 96-128, DA 97-678 ("April 4 Clarification Order"), and a pair of similarly identical applications for review of the Bureau's April 15, 1997 Order, DA 97-805 ("April 15 Waiver Order"). No matter how many copies of the applications for review Telco and Excel file, however, they cannot disguise the fact that the applications themselves are entirely without merit. Accordingly, the members of the RBOC/GTE Payphone Coalition submit these joint comments and opposition to the applications for review.[1]

1. The members of the RBOC/GTE Payphone Coalition are Ameritech, the Bell Atlantic telephone companies, BellSouth Corporation, GTE Service Corp. and the GTE telephone companies, NYNEX Corporation, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company, and U S WEST, Inc.

BACKGROUND

The Telecommunications Act of 1996 required the Commission to restructure the payphone industry. LEC payphone costs had previously been recouped, not through direct payphone charges, but through a complicated system of subsidies. Congress directed the Commission to abolish that system, 47 U.S.C. § 276(b)(1)(B), and replace it with a system under which all payphone service providers ("PSPs"), including those affiliated with LECs, would be "fairly" compensated for "each and every call" completed using their payphones. 47 U.S.C. § 276(b)(1)(A).

In its payphone orders,[2] the Commission undertook to implement that mandate. In particular, pending the implementation of true per-call compensation, the Commission established an interim compensation system in which most PSPs would be eligible to participate almost immediately. PSPs associated with LECs, however, would only be eligible for interim compensation once they had eliminated payphone cost recovery from non-payphone rate elements (i.e., existing subsidies) and had put certain competitive safeguards into place. See Recon. Order at 61, ¶ 131. Of these competitive safeguards, two are of specific importance here. First, the Commission imposed a federal tariffing requirement for certain, unbundled payphone features and functions. Id. at 75, ¶ 162. Second, it required the two basic payphone lines offered to affiliated and unaffiliated PSPs to be tariffed with the states. Id. at 75-77, ¶¶ 162-63.

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2. Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, FCC No. 96-388 (rel. Sept. 20, 1996) ("Report and Order"), on reconsideration, Order on Reconsideration, FCC No. 96-439 (rel. Nov. 8, 1996) ("Recon. Order"), affirmed in part and remanded in part, Illinois Public Telecommunications Ass'n v. FCC, No. 96-1394 (D.C. Cir. July 1, 1997).

A. The Federal Tariffing Requirement and the April 4 Clarification Order

Shortly before the deadline for the filing of federal tariffs, various parties began to dispute the scope of the federal tariffing requirement. In the April 4 Clarification Order, the Bureau clarified its scope. In particular, the Bureau explained that federal tariffing was required not merely for payphone-specific, network features or functions that LECs offer on an unbundled basis to their own payphone operations. Instead, and notwithstanding contrary language in the payphone orders themselves, federal tariffing also was required for such features or functions that LECs offer on an unbundled basis to unaffiliated PSPs. April 4 Clarification Order at 9, ¶¶ 17-18.

At the same time, the Bureau recognized that this reading of the payphone orders -- issued just 11 days before the April 15, 1997 deadline for filing federal tariffs -- had taken many LECs by surprise. The Bureau acknowledged that the LECs had reasonably read the federal tariffing requirement as being limited only to those unbundled, payphone-specific, network features or functions that LECs offer to their own operations. Id. at 11, ¶ 20. Accordingly, the Bureau afforded the LECs 45 days from the issuance of the Order (an extension of just 34 days) in order to meet these newly-clarified requirements. Id. at 11-12, ¶ 21.

B. Application of the Federal "New Services Test" to State Tariffs and the April 15 Waiver Order

In the April 4 Clarification Order, the Commission also went on to resolve disputes that had arisen concerning the rules applicable to state tariffs for the basic payphone lines. See id. at 13 (Section entitled "Clarification of State Tariffing Requirements"). In particular, it explained that a federal pricing test -- the "new services test" set forth in 47 C.F.R. § 61.49 -- would apply to the pricing of the basic payphone lines whether or not those lines were "new." See April 4 Clarification Order at 15, ¶ 30 & n.91; contrast id. at 14, ¶ 27 (reciting BOC arguments to the contrary).

This second "clarification" also took the LECs by surprise. Nowhere in the payphone orders did the Commission state that the federal "new services test" applied not only to federally-tariffed services that were new but also to pre-existing, state-tariffed services that had been around for decades. Nor did those orders state that the "new services test" applied to basic payphone lines, rather than unbundled services. To the contrary, the RBOCs and GTE all had believed, based on the language of the Commission's orders and the terms of the "new services test" itself, that precisely the opposite was true.

Accordingly, the RBOC Payphone Coalition filed a request for a waiver, allowing its members and other LECs an additional 45 days in which to file state tariffs or otherwise ensure that their state tariffs were consistent with the new services test. The waiver, the Coalition explained, would not harm any competitor or any PSP. To the contrary, the LECs undertook, consistent with state law, "to reimburse or provide credit to those purchasing the affected services" to the extent application of the new services test caused prices to go down. April 15 Waiver Order at 7, ¶ 14 (emphasis added). Indeed, because of this, the waiver was advantageous for competing PSPs, who (notably) have declined to file an application for review. If the new services test caused prices to go up, the independent PSPs would not have to pay an increase retroactive to April 15, 1997. But if prices went down, competing PSPs would get a refund or a credit as if prices had decreased effective April 15.

The Bureau granted the waiver. It reviewed "the contentions of the RBOC Coalition and the language it cite[d] from the two orders in the Payphone Reclassification Proceeding." Id. at 9, ¶ 18. And it concluded that the RBOCs had relied on a reasonable reading of the orders and "made a good faith effort to comply with the requirements" based on that reading. Ibid. Moreover, because the LECs had committed to reimbursing PSPs to the extent the new services test caused prices to go down, no PSP would be harmed; and because subsidies still would be removed on time, no interexchange carriers would be harmed either. Id. at 11, ¶ 20.

DISCUSSION

Telco and Excel's challenges to the Bureau's April 4 Clarification Order and the April 15 Waiver Order are both procedurally improper and substantively meritless. They should be dismissed.

I. BECAUSE TELCO AND EXCEL FAILED TO PLACE THEIR ARGUMENTS BEFORE THE BUREAU, THEY CANNOT RAISE THEM BY WAY OF A PETITION FOR REVIEW

The Commission's rules are unmistakably clear: Absent special circumstances, a party may not file an application for review unless it participated in the proceedings before the Bureau. In particular:

> Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding.

47 C.F.R. § 1.115(a) (emphasis added). This rule makes good sense. A party ought not be permitted to "sandbag" the Bureau by challenging a Bureau order without ever having advised the Bureau of its interest or making any effort to press its arguments before the Bureau.

Yet Excel and Telco have done precisely that here. At no point did Excel or Telco advise the Bureau of their position on the issues addressed by the April 4 Clarification Order or the April 15 Waiver Order. Despite extensive filings on the subject from many parties before those orders were issued -- and despite Telco and Excel's ability to advise the Bureau of their positions after the orders by filing petitions for reconsideration -- the Bureau heard not a peep from either carrier.[3] Instead, Excel and Telco raised their concerns for the first time in applications for review. Because Telco and Excel nowhere provide any excuse for their belated participation -- much less a reason why it was "not possible" for them to participate earlier, as required by the Commission's rules -- their applications for review must be dismissed. 47 C.F.R. § 1.115(a).

II. TELCO'S AND EXCEL'S APPLICATIONS FOR REVIEW OF THE APRIL 4 CLARIFICATION ORDER WHOLLY IGNORE THE REASONS THE LIMITED, 34-DAY WAIVER WAS GRANTED

Telco and Excel's submissions contain extensive rhetoric (though precious little genuine analysis) about the need for federal tariffing. But the validity and scope of the federal tariffing requirement are no longer in question. Telco and Excel utterly ignore the only issue that is relevant here, which is why the Bureau granted a 34-day waiver of that requirement.

A. Based on a plain reading of the Commission's payphone orders, almost all LECs understood the federal tariffing requirement to be very limited. In particular, they believed that it applied only to payphone-specific, network services that the LEC provided to its own PSP

3. There is a good reason for this. Because the services at issue are rendered to PSPs and not interexchange carriers, interexchange carriers like Telco have no genuine interest in their tariffing. Telco and Excel have joined issue now, after the Bureau entered its orders, only in a transparent attempt to avoid paying their fair share of per-call compensation.

operations. See Ex Parte Letter from Michael K. Kellogg to Mary Beth Richards, Mar. 19, 1997, at 4.

In the April 4 Clarification Order, the Bureau opted for a more expansive interpretation of the Commission's payphone orders. In addition to requiring federal tariffing of unbundled, payphone specific, network features and functions actually used by the LEC's PSP, the Bureau interpreted the Commission's orders to require federal tariffing of such features and functions if they are "provided to other [PSPs]." April 4 Clarification Order at 8, ¶ 15.

The Bureau, however, recognized that the interpretation followed by the LECs was far from unreasonable -- it was supported by "language . . . from the two orders in the Payphone Reclassification Proceeding" -- and that the LECs had made "a good faith effort to comply with the requirements." Id. at 11, ¶ 20; see also ibid. ("the Coalition's narrower reading of what payphone services need to be federally tariffed is based on its good faith efforts to comply with the Commission's rules").

Given the reasonableness of the LECs' reading of the payphone orders, and the fact that the clarification was issued on April 4, 1997, just 11 days before the deadline for filing the federal tariffs, the Bureau properly concluded that a limited waiver was appropriate. See April 4 Clarification Order at 12, ¶ 23. As the Bureau explained, the lack of clarity of the Commission's prior orders, and the short amount of time left between the clarification and the deadline for compliance, constituted "special circumstances" that made a waiver appropriate. Id.

B. Telco does not challenge the Bureau's conclusion in this respect. Nor could it. The LECs' reading of the payphone orders was not only well-founded but compelling. Time and again the payphone orders indicated that federal tariffing would be required for certain payphone services, but limited that requirement to those provided by the LEC to its own operations. The Order on Reconsideration, for example, states:

> To implement [Section 276's requirements, the Report and Order] established a requirement that LECs provide tariffed payphone services to independent payphone providers that they provide to their own payphone operations. Federal tariffing enables the Commission to directly ensure that payphone services comply with Section 276.

Recon. Order at 75, ¶ 162 (emphasis added, footnote omitted). In the very same paragraph, the Commission further explains that, "as required by the Report and Order, any basic network services or unbundled features used by a LEC's operations to provide payphone services must be similarly available to independent payphone providers on a nondiscriminatory, tariffed basis. Those unbundled features or functions must be tariffed in the state and federal jurisdiction." Id. at 76, ¶ 162 (emphasis added). Three paragraphs later, the Order on Reconsideration reiterates this yet again: "We clarify that any unbundled network features provided to a LEC payphone operation must be available on a nondiscriminatory basis to independent payphone providers and must be tariffed in the federal and state jurisdictions." Id. at 77, ¶ 165 (emphasis added).[4]

This language is also consistent with the philosophy underlying the CEI and ONA principles on which the payphone orders were based. Tariffing of just the unbundled features the LECs actually use is normally sufficient to ensure equal treatment. Consequently, CEI plans

4. See also Report and Order at 74, ¶ 146 ("[I]ncumbent LECs must offer individual central office coin transmission services to PSPs under nondiscriminatory, public, tariffed offerings if the LECs provide those services for their own operations" (emphasis added, footnote omitted)); id. ("[I]ncumbent LECs must provide coin service so competitive payphone providers can offer payphone services using either instrument-implemented 'smart payphones' or 'dumb' payphones that utilize central office coin services, or some combination of the two in a manner similar to the LECs" (emphasis added)); id. at 75-76, ¶ 148 ("any basic transmission services provided by a LEC to its own payphone operations must be available under tariff to other payphone providers pursuant to Computer II" (emphasis added, footnote omitted)).

normally do not have to include unbundling or tariffing for features that the LECs themselves do not use. See, e.g., Memorandum Opinion and Order, NYNEX CEI Plan for Voice Messaging Services, 4 FCC Rcd 554, ¶ 15 (Com. Carrier Bureau 1989) ("For CEI purposes a BOC must only make available to others the same basic services that it uses . . . . [No] further unbundling . . . is required to satisfy CEI requirements."). Only if a bona fide request is made for further unbundling, pursuant to established ONA procedures, does any further tariffing requirement come into play. Obviously, no such request has yet been made in the payphone context. This is not only critical, but dispositive: The Commission had committed itself to imposing no greater requirements than those required by Computer III and CEI.[5]

Based on this clear language and these settled ONA and CEI principles, it was wholly reasonable for the LECs to read the payphone orders as limiting the federal tariffing requirement to unbundled features actually used by the LECs. Indeed, the "Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements" exhibits the same understanding. It states: "Any basic network services or unbundled features used by a LECs operations to provide payphone services must be similarly available to independent payphone providers on a

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5. As the Commission explained:

> [W]e conclude that the Computer III and ONA nonstructural safeguards will provide an appropriate regulatory framework to ensure that BOCs do not discriminate or cross-subsidize in their provision of payphone service. . . . We conclude that we do not have to adopt any additional safeguards beyond Computer III and ONA because of the comprehensive nature of that regulatory structure and the lack of a record necessary to conclude that a more burdensome framework should be adopted and is in the public interest.

Report and Order at 100, ¶ 199.

nondiscriminatory, tariffed basis and must be tariffed in the state and federal jurisdiction." Recon. Order at 114, ¶ 263 (emphasis added).

Given the reasonableness and good-faith nature of the LECs' understanding, surely it was not error for the Bureau to issue a limited, 34-day waiver. In fact, in light of the above-cited language, failure to grant a waiver would have left the Bureau's decision open to legal challenge. The Commission, of course, may impose appropriate safeguards in its sound discretion. But it must provide fair notice of what conduct is prescribed. See General Elec. Co. v. EPA, 53 F.3d 1324, 1329-30 (D.C. Cir. 1995) (reversing agency sanction based on permissible but non-obvious interpretation of rules); Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (deference to agency interpretations cannot validate application of regulation if regulation "fails to give fair warning of the conduct it prohibits or requires"). Certainly it was reasonable for the Bureau to avoid this potential legal challenge to its actions by granting a limited waiver and giving LECs time to conform with its newly-announced interpretation.

C. Rather than challenge the reasons for the waiver given by the Bureau, Telco and Excel string together a few quotes from the payphone orders which, cumulatively, explain the need for safeguards and the appropriateness of proceeding with caution. See Telco AFR at 3-4; Excel AFR at 3-4. But Telco and Excel do not offer any good reason to believe that the limited 34-day waiver authorized by the April 4 Clarification Order is inconsistent with these admonitions.

1. According to Telco and Excel, the Bureau erred in granting the waiver because doing so created an unacceptable risk that LECs might "simultaneously . . . receiv[e] anticompetitive subsidies and compensation from IXCs." Telco AFR at 3 (footnote omitted). It is hard to see how this could be so. Contrary to Telco and Excel's unsubstantiated assertions, the federal tariffing requirement was not designed to eliminate the recovery of payphone costs from non-payphone rate elements. It was designed to "safeguard[] against discrimination." April 4 Clarification Order at 8, ¶ 15.[6]

Besides, as the Bureau pointed out, the requirement that cross-subsidies be eliminated was in no way modified. See April 15 Waiver Order at 11, ¶ 20. As a result, the LECs eliminated all such cost elements and subsidies by April 15, 1997, as required by the Commission. It is thus unsurprising that neither Telco nor Excel purport to identify a single instance in which the limited, 34-day waiver of the federal tariffing requirement delayed the elimination of payphone costs from non-payphone rate elements. Telco and Excel thus have no basis whatsoever for alleging double-recovery.

2. Telco and Excel also argue that the waiver somehow perpetuates discrimination. As an initial matter, it is doubtful that Telco and Excel even have standing to raise this issue. The supposed targets of this alleged discrimination are PSPs, not IXCs like Telco.[7]

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6. In support of its position that federal tariffing of unbundled elements was designed to eliminate payphone subsidies, Telco and Excel both cite paragraph 127 of the Commission's Report and Order. Paragraph 127, however, says nothing whatsoever about federal tariffing. To the contrary, it addresses a totally different question -- "reclassification of incumbent LEC-owned payphones" as deregulated CPE.

7. Telco and Excel also entirely ignore the additional safeguards the Commission imposed when it granted the waiver. To ensure that these services were available under non-discriminatory state tariffs, the Commission required any LEC seeking to use the waiver to submit a written ex parte -- by April 19, 1997 -- advising the Commission of the status of intrastate tariffs for the features and functions. April 4 Clarification Order at 12, ¶ 22.

In any event, Telco and Excel make no effort to identify a single supposedly discriminatory act that was perpetuated by the limited 34-day waiver. Similarly, they offer no comment on the impact that waiting an extra 34 days for federal tariffing would have on independent PSPs. They thus do nothing to contradict the Bureau's sound conclusion that granting the waiver "would not undermine, and is consistent with" the policies announced in the payphone orders. April 4 Clarification Order ¶ 23.

III. TELCO AND EXCEL'S APPLICATIONS FOR REVIEW OF THE APRIL 15 WAIVER ORDER ARE WHOLLY WITHOUT MERIT

In its April 15 Waiver Order, the Bureau recognized that the payphone orders had not made the nature of the state tariffing obligations entirely clear. In particular, those orders did not state with clarity that the Commission expected the federal "new services test" -- which by its terms applies only to federal services that in fact are new -- to be applied in the states to services that were not new. While the Bureau spelled this out in the April 4 Clarification Order, that clarification came, once again, only 11 days before the deadline. Accordingly, the Bureau gave the LECs additional time to ensure that their existing, state tariffs complied with the "new services test" (or to file new ones), and additional time for the states to act.

Excel and Telco argue that this was a mistake because the Commission's payphone orders made it clear that the "new services test" applied even to existing, state-tariffed basic payphone lines from the outset. See Telco AFR at 5-6; Excel AFR at 5-6. The LECs' misunderstanding, they argue, was feigned and not real. Excel and Telco, once again, are simply wrong.

A. Far from making the applicability of the "new services test" to old, existing, basic bundled services clear, the Commission's Report and Order suggested that precisely the opposite was true. It specified that the new services test applied only to unbundled elements of the "smart lines" (for "dumb" payphones) which provide "central-office coin services," and which have not been provided to independent PSPs in the past. "Dumb" COCOT lines (for "smart" payphones), which do not provide "central-office coin services," and which long have been provided to independent PSPs, did not have to meet this test:

> Because the incumbent LECs have used central office coin services in the past, but have not made these services available to independent payphone providers . . . we require that incumbent LEC provision of coin transmission services on an unbundled basis be treated as a new service under the Commission's price cap rules. [W]e conclude that the new services test is necessary to ensure that central office coin services are priced reasonably. Incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services . . . .

Report and Order at 74, ¶ 146 (emphasis added). The Report and Order thus appeared to limit application of the "new services test" to services that in fact are "new," i.e., any unbundled "central office coin services" that previously were not offered to independent PSPs.

Second, the new services test, by its own terms, applies only to new services introduced under price caps. It does not apply to existing services or where rate of return regulation is in place. See 47 C.F.R. § 61.3 (defining a "new service" as "A tariff filing that provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers"). Nothing in the payphone orders suggests that, in noting the applicability of the "new services test" to some payphone services, the Commission meant to over-ride a limitation expressly provided for in the new services test itself -- i.e., that it applies only to services that in fact are new.

Based on this, many LECs -- including the members of the RBOC/GTE Payphone Coalition -- concluded that the "new services test" applied only to unbundled elements of the "coin line" that were "new," i.e., not previously offered to unaffiliated PSPs. Indeed, the Reconsideration Order seemed to confirm this reading. While the Reconsideration Order announced that basic payphone lines would be tariffed at the state level and would not be tariffed federally, nothing in it stated that the limits on application of the "new services test" -- announced in the Report and Order and contained in the language of the "new services test" itself -- would be abrogated. To the contrary, the text of the Reconsideration Order actually restates those limits without any suggestion that they had been lifted.[8]

Telco and Excel do not address this reading of the payphone orders at all. They do not quote any language from any order that extends the "new services" test to intrastate services that are not new, that are not unbundled, and that do not provide "central office coin services." Report and Order at 74, ¶ 146; 47 C.F.R. § 61.3. Instead, they rely on the fact that, in the Reconsideration Order, a footnote that does nothing more than cite the new services test happens to be attached to a sentence describing state tariffing obligations.[9] From this, Telco and Excel

8. Describing what the Commission did in the Report and Order, the Recon. Order states:

> We also required that incumbent LEC provision of coin transmission services on an unbundled basis be treated as a new service under the Commission's price cap rules. The Report and Order required that incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services, pursuant to Section 61.38, 61.39, or 61.50(i) of the Commission's rules.

Recon. Order at 68, ¶ 146 (emphasis added).

9. In particular, Paragraph 163 of the Order on Reconsideration states as follows:

> The tariffs for these LEC payphone services must be: (1) cost-based;

appear to infer that the Order on Reconsideration -- at the same time it eliminated the federal tariffing requirement for bundled lines -- not only expanded the applicability of the "new services test" beyond "new" "unbundled" features to existing, state-tariffed basic line services, but also made this expansion clear and indisputable. Telco AFR at 5-6; Excel AFR at 5-6.

It is hard to discern how Telco and Excel can conclude this based solely on the location of a footnote, especially where the footnote merely provides a citation for the new services test. Nothing in the Order on Reconsideration suggests that the Commission intended to alter the limits imposed by the original Report and Order, which unambiguously limited application of the new services test to services that in fact are "new," i.e., to unbundled "central office coin services" that LECs previously had "not made . . . available to independent payphone providers." Report and Order at 74, ¶ 146. Nor does that order suggest that the same limit, clearly stated in the regulation setting forth the rule itself, would be cast aside. See 47 C.F.R. § 61.3. To the contrary, the footnote upon which Telco and Excel rely actually cross-cites both the regulation and the Report and Order. Consequently, the most logical reading of the footnote is that the new services test was to be applied, if at all, subject to the limitations set forth in both the Report and

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> (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services.

Recon. Order at 75, ¶ 163. Just after the words "intrastate services," there is a footnote which states that the "new services test required in the Report and Order is described at 47 C.F.R. Section 61.49(g)(2)." Id. at n.492.

Order and in the test itself, i.e., that it would apply only to unbundled coin-line services that in fact were "new."[10]

IV. THE BUREAU PROPERLY APPLIED THE COMMISSION'S SETTLED WAIVER STANDARDS

Telco and Excel not only fail to meet the Bureau's reasoning for granting the waivers in question, they fail even to address the Commission's settled waiver standards.

Under Section 1.3 of the Commission's rules, the Commission may waive any rule for "good cause" shown. 47 C.F.R. § 1.3. Consequently, a waiver is appropriate if "special circumstances" warrant deviation from the general rule and "such deviation will serve the public interest." Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990). Relevant considerations include "hardship, equity" and "more effective implementation of overall policy." WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

There can be no doubt that those considerations supported the waivers at issue here. Clearly, special circumstances exist. The LECs had reasonably relied in good-faith on a reading of the Commission's orders that was not merely plausible but solidly grounded in the language of

10. Indeed, reading footnote 492 in the Order on Reconsideration as requiring application of the "new services test" to basic, existing, state-tariffed lines was implausible in two additional respects. First, it was inconsistent with the origins of the "new services test." When the Commission promulgated the new services test as part of ONA, it expressly disavowed any intent to preempt state pricing mechanisms or require states to apply the rule to intrastate services. See Memorandum Opinion and Order, Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 163, ¶ 311 (1988) ("[W]e do not take any preemptive actions in this order"); id. at 173, ¶ 330 (state tariffs under ONA subject to "existing tariff review procedures on the state" level). Second, it was inconsistent with the Report and Order, which announced that the Commission was not imposing requirements beyond those required by Computer III itself. See Report and Order at 100, ¶ 199. Surely it was not unreasonable for the LECs to believe that, when the Commission chooses to disregard its prior pronouncements -- and impose federal obligations in the area of intrastate service traditionally governed by the states -- it will do so explicitly.

and policies underlying the Commission's orders. See pp. 11-14, supra. And the clarification explaining that this good-faith reading was incorrect came just 11 days before the deadline, too late for the LECs to comply on time. Ibid.

Equally clearly, denying the waivers would have imposed extreme, unwarranted and inequitable hardship on the LECs. Even though the LECs already had given up hundreds of millions of dollars in subsidies formerly used to support payphones (by removing payphone costs from non-payphone rate elements), the LECs also would have been denied the interim compensation that was supposed to be a substitute therefor. This loss would have been imposed even though the LECs relied in good faith on a reasonable interpretation of the payphone orders; even though their interpretation was not only reasonable but well-supported in the language of the orders; and even though the alternative -- limited, 34- and 45-day waivers -- did not impose demonstrable harm on anyone. A more inequitable result is difficult to imagine. This is especially true given that, under the April 15th waiver, unaffiliated PSPs are better off than they would have been absent the waiver. See p. 4, supra.

Finally, such a result would have been at odds with the policy established by Congress. In Section 276, the Commission required LECs to give up intrastate and interstate payphone subsidies formerly used to support their payphones "in favor of" per-call compensation. 47 U.S.C. § 276(b)(1)(B). It further mandated that the Commission ensure that LECs and other PSPs be "fairly" compensated for "each and every call" completed using their payphones. Id. § 276(b)(1)(A). Absent a waiver, both of these policies would have been violated. LECs would have given up their subsidies "in favor of" nothing. And they would have been denied compensation for calls made from their payphones. Under these circumstances, the Bureau's conclusion that the waiver was consistent with, and promoted, the congressional scheme was not only correct, but inescapable.

Conclusion

Telco and Excel's petitions for review should be DISMISSED or DENIED.

Respectfully submitted,

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August 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 1997, I caused copies of the foregoing RBOC/GTE Payphone Coalition's Opposition to, and Comments on, Telco and Excel's Applications for Review of the Bureau's Orders of April 4, 1997 and April 15, 1997 to be served upon the parties listed below by first-class mail.

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